

MEMORANDUM

WQSP-00-01

SUBJECT: Policy Memo on Water Quality Standards Approvals and Endangered Species Act (ESA) Consultations

FROM: Geoffrey H. Grubbs, Director [original signed 9/15/00]
Office of Science and Technology

TO: Water Division Directors, I-X

On March 30, 2000, EPA revised its regulation that specifies when new and revised State and Tribal water quality standards (WQS) become effective for Clean Water Act (CWA) purposes (40 CFR 131.21, 65 FR 24641, April 27, 2000). Under EPA's new regulation (also known as the *Alaska* rule), new and revised standards submitted to EPA after May 30, 2000, must be approved before being used for CWA purposes. As a general matter, this means that new and revised State and Tribal water quality standards must be approved by EPA before being used to identify impaired waters, calculate Total Maximum Daily Loads (TMDLs), develop National Pollutant Discharge Elimination System (NPDES) permits, evaluate proposed discharges of dredged or fill material under CWA §404, or issue certifications under CWA §401.

In light of the important programmatic and legal changes that flow from this new regulation, I believe we must redouble our efforts to take action on new and revised water quality standards within the deadlines contained in Section 303(c) of the CWA. In taking these actions, EPA must comply with Section 7(a)(2) of the ESA, which directs Federal agencies to ensure, in consultation with the Fish and Wildlife Service and National Marine Fisheries Service (collectively, the Services) that their actions are not likely to jeopardize the continued existence of federally listed endangered and threatened species, or result in the destruction or adverse modification of the species' designated critical habitat. In the past, these consultations have in some cases been time-consuming, and caused delays in our taking final action on new and revised standards. This memorandum provides guidance on means to ensure that we carry out our responsibilities under the ESA in a manner consistent with the time limits in Section 303(c) of the CWA (i.e., 60 days to approve/90 days to disapprove).

As you know, we have been developing a Memorandum of Agreement (MOA) with the Services on enhanced coordination under the CWA and the ESA. A draft MOA was published on January 15, 1999 (64 Fed. Reg. 2742), and we expect to sign a final MOA in the near future. (A copy of the draft MOA's provisions on new and revised water quality standards is attached). One important component of the MOA is the commitment to work with the Services and States/Tribes early in the water quality standards development process, so that potential endangered/threatened species issues can be addressed efficiently within our CWA timeframes. For example, the MOA calls for EPA to provide the Services annually with a list of all upcoming, scheduled triennial reviews for the next five year period, and to schedule meetings with the Services and States/Tribes to discuss the extent of an upcoming triennial review. The MOA also contemplates that EPA will request the Services to review and comment on draft standards that are being developed by States and Tribes, and initiate discussions with the Services if there is a concern about potential impacts to endangered and threatened species. In addition, the MOA calls for EPA to begin consulting with the Services under Section 7(a)(2) of the ESA prior to submittal of new and revised standards to EPA, so that the consultation process can be completed within our CWA deadlines for approving/disapproving standards. Finally, under the MOA, we intend to conduct a national consultation on EPA's aquatic life criteria guidance published under section 304(a) of the CWA. After that consultation is initiated, under the MOA, EPA may proceed with approving, subject to the results of the national consultation, State-adopted water quality criteria that are as stringent as EPA's guidance.

To help minimize any potential confusion or delay in implementing new or revised standards adopted by States and authorized Tribes, I strongly encourage you to begin discussing with your Service counterparts the development of procedures, such as those described in the draft MOA, for early involvement of the Service in the standards development and review process. Doing so will help ensure that you can complete Section 7 consultations in accordance with our CWA deadlines. You may wish to use the "Collaborative Scenario" on page 11-12 of my memorandum "National Coordination of EPA's Water Quality Standards Actions" sent on May 9, 2000, to the Water Management Division Directors, as a starting point (see Attachment 1). The procedures outlined in the draft MOA reflect lengthy discussions held between EPA and the Services over a number of years about the best ways to make our consultations more meaningful and timely. At this time, we are not contemplating making any significant changes to those procedures in the final MOA. In light of the new regime created by the *Alaska* rule, I believe that we must begin now to take steps like those described in the MOA to ensure that any necessary consultation under Section 7 of the ESA is completed in accordance with our CWA timeframes.

I recognize that it will take some time to develop new coordination procedures with the Service and that, even after new procedures are put in place, it may not be possible to complete consultation in all cases by our CWA deadlines despite your best efforts to do so. Therefore, where the Region has determined that standards are otherwise approvable under the CWA and has initiated, but not yet completed consultation, and has documented compliance with Section 7(d) of the ESA (described below), I encourage you to approve State and Tribal water quality

standards subject to the results of Section 7 consultation under the ESA. Moving forward with our CWA approval action in this fashion would enable us to fulfill our mandatory duties under the CWA in a manner consistent with our duties under the ESA.

If you decide that it is appropriate to approve the standards subject to the results of ESA consultation, it is critical that the Regions develop a record demonstrating that your decision is consistent with the requirements of the ESA. After initiation of consultation, Section 7(d) of the ESA prohibits irreversible or irretrievable commitments of resources that have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would not violate Section 7(a)(2) of the ESA. As a general matter, EPA approval of water quality standards is not irreversible or irretrievable because the Agency retains substantial discretion to revise its decision based on the results of the consultation. To make this clear, our approval actions should expressly state that EPA is approving the standards "subject to the results of consultation under Section 7 of the Endangered Species Act."

EPA retains the full range of options available under Section 303(c) of the CWA for ensuring water quality standards are protective of threatened and endangered species. Should the consultation, once concluded, indicate that new or revised standards are necessary to protect threatened or endangered species or their critical habitat, EPA has several options available. As described in the draft MOA, EPA can work with the State or authorized Tribe to obtain revisions to the standards in the next triennial review; alternatively, EPA can work with the State or authorized Tribe to facilitate a more narrow set of revisions to the standards in the short term. If clear and compelling information from the consultation indicates more immediate action is necessary to prevent a loss of threatened or endangered species, EPA can make a determination under CWA Section 303(c)(4)(B) that a revised or new standard is necessary to meet the requirements of the Act and initiate Federal rulemaking to supercede the State/Tribal standard. An additional option that may be available in appropriate circumstances would be to change the "subject to" approval to a "disapproval." In choosing from these options, EPA's actions should be tailored to the facts in a given situation taking into consideration the environmental risks at stake, the State or Tribes' regulatory revision process, and the availability of a scientifically defensible Federal alternative. Headquarters is available to assist the Regions in evaluating the most appropriate response for a given situation.

To ensure compliance with Section 7(d) of the ESA, EPA also needs to be satisfied that the standards being approved will not result in impacts of concern on the species pending completion of consultation. Particularly where the new and revised standards being approved are less stringent than the existing standards, the record should contain the Region's evaluation of the anticipated short-term effects of the standards on the species and the basis for your conclusion that there are not impacts of concern during the interim period until consultation is completed. This evaluation should include consideration of whether or not activities in the affected area, such as issuance of NPDES permits, will occur prior to completion of the consultation. Under the procedures in the draft MOA for consulting on new and revised standards, the Region may have already prepared a draft Biological Evaluation. This document may suffice for purposes of the

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Section 7(d) determination if it addresses the above factors, although a full Biological Evaluation may contain more elements than are necessary for a Section 7(d) evaluation. Section 7(d) evaluations need only focus on anticipated effects that are likely to occur during the time it takes to complete consultation. If a draft Biological Evaluation indicates that the State or Tribal standards are protective of the species, then EPA would have a basis for concluding that there are not impacts of concern during this interim time period before consultation is completed.

EPA approval of water quality standards under the *Alaska* rule means that the standards can then be relied upon for other CWA activities, including issuance of NPDES permits and establishment of TMDLs. Depending on the length of time it will take to complete the consultation and the significance of any potential endangered species issues, the Region should discuss these CWA activities with the State or authorized Tribe, and identify steps that should be taken (e.g., inclusion of reopener clauses in NPDES permits) that would help ensure the activities can be adjusted if changes are made to the water quality standards based on the results of the ESA consultation. EPA's approval letter could make note of any specific steps that the state or authorized Tribe should take to address this situation should it arise.

The Office of Water and Office of General Counsel have developed draft language to serve as a guide in documenting compliance with Section 7(d) should that be necessary (see Attachment 2). The attached memorandum to the record should be tailored for each CWA approval action taken subject to completion of ESA consultation and placed in the record supporting EPA's decision. The Regional WQS program offices should consult with the Offices of Regional Counsel prior to taking any action approving water quality standards subject to the results of ESA consultation. In any case where the Services or the public have raised questions about approval of standards subject to the results of ESA consultation, you should coordinate with Headquarters.

I believe it is imperative that we take action on State and Tribal submissions in the CWA timeframes in order to avoid any new backlogs of outstanding standards submissions with more serious implications. Not only would any new backlog in water quality standards actions delay timely decisions to control environmental problems and increase uncertainty, but timely action is necessary to bolster the credibility and effectiveness of the water quality standards program. EPA's Regional Offices should continue to coordinate with States and Tribes early in the State and Tribal standards development process. This will help avoid any confusion as to what is "approvable." EPA believes that early and frequent communication will help ensure that States and authorized Tribes submit standards revisions that are scientifically defensible and consistent with the CWA, thus allowing EPA to expeditiously approve them once officially submitted to EPA. If you have any questions or concerns, please do not hesitate to call me at 202-260-5400, or Dr. Elizabeth Southerland, Director of the Standards and Applied Sciences Divisions, at 202-260-3966.

Attachments

cc: Chuck Fox
Dana Minerva
Mike Cook
Robert Wayland
Susan Lepow
Regional Water Quality Branch Chiefs
Regional Water Quality Standards Coordinators

ATTACHMENT 1

(below are pages 11-12 of a May 9, 2000, Memorandum to the Water Management Division Directors entitled "National Coordination of EPA's Water Quality Standards Actions" signed by Geoffrey H. Grubbs)

"Collaborative" Scenario

<u>Time Relative to WQS submission</u>	<u>Activities</u>
-3 years	<ul style="list-style-type: none">- State/Tribe begins rule development phase of triennial review.- Service(s) will participate in a meeting scheduled by EPA, attended by EPA, the State/Tribe, and the Service(s), to discuss the extent of the upcoming review.
Ongoing, as needed	<ul style="list-style-type: none">- EPA requests Service(s) comments on draft standards, or participation in appropriate meetings with State/Tribe. Service(s) will make every effort to be responsive to such requests that EPA indicates are of high priority.
-670 days	<ul style="list-style-type: none">- State/Tribe completes rule development phase of triennial review, submits proposed WQS to EPA.
-650 days	<ul style="list-style-type: none">- EPA initiates informal consultation on proposed revisions if, based on initial review, proposed WQS look approvable.
-590 days	<ul style="list-style-type: none">- Service(s) notify EPA that proposed WQS (a) are not likely to adversely affect listed species (i.e., consultation is complete), or (b) are likely to adversely affect listed species (i.e., formal consultation is necessary).- Service(s) provide sufficient information to assist State/Tribe in identifying issues for public comment (see below).
-560 days	<ul style="list-style-type: none">- EPA submits information (including Biological Evaluation) to begin formal consultation on proposed WQS.
-515 days	<ul style="list-style-type: none">- State/Tribe begins public comment period on proposed WQS. State/Tribe should attempt to take comment on issues likely to be raised in the consultation, in order to avoid re-proposing to accommodate potential changes.
-470 days	<ul style="list-style-type: none">- Service(s) begins development of draft Biological Opinion on proposed WQS.

- 425 days - Close of public comment period
- Service(s) provides draft Biological Opinion on proposed WQS to EPA and the State/Tribe. If draft BO requires revisions to the proposed WQS to avoid jeopardy, they should be identified and provided to State/Tribe on or before this date. Draft BO should also identify elements of the proposed WQS that may not be changed without causing jeopardy.
- EPA informs State of necessary changes to proposed revisions.
- 365 days - State/Tribe submits final WQS for adoption, based on review of comments and input from EPA/Service(s).
- 30 days - State/Tribal adoption process complete.
- 0 - **State/Tribe submits final adopted WQS to EPA**
- Service(s) provide final BO reflecting any changes needed from draft BO to reflect final adopted WQS
- +60 days - EPA approves new or revised State/Tribal WQS

Attachment 2
Template Memo for Regions to Tailor for Specific State/Tribal Actions

MEMORANDUM

SUBJECT: Endangered Species Act Section 7(d) Determination For EPA's Approval of
 [insert State or authorized Tribes'] Water Quality Standards

FROM: [Appropriate Manager; e.g., Regional Branch Chief or Division Director]

TO: The Record

This memorandum documents EPA's determination that EPA's decision to approve [insert the State or Tribes'] standards subject to completion of Endangered Species Act consultation with the [U.S. Fish and Wildlife Service and/or National Marine Fisheries Service] is consistent with section 7(d) of the ESA.

EPA initiated consultation with the Service(s) on [insert date] under section 7(a)(2) of the Endangered Species Act.¹ Section 7(a)(2) requires that federal agencies, in consultation with the Services, insure that their actions are not likely to jeopardize the existence of federally listed species or result in the adverse modification of designated critical habitat of such species. Upon initiation of consultation, section 7(d) of the ESA prohibits irreversible or irretrievable commitments of resources that have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would not violate section 7(a)(2) of the ESA.

EPA's approval decision does not foreclose either the formulation by the Services, or the implementation by EPA, of any alternatives that might be determined in the consultation to be needed to comply with section 7(a)(2). By approving the standards "subject to the results of consultation under section 7(a)(2) of the Endangered Species Act," EPA has explicitly stated that it retains its discretion to take appropriate action if the consultation identifies deficiencies in the standards requiring remedial action by EPA. EPA retains the full range of options available under section 303(c) for ensuring water quality standards are environmentally protective. EPA can, for example, work with the [insert State or Tribe] to ensure that the [insert State or Tribe] revises its standards as needed to ensure listed species' protection, initiate rulemaking to promulgate federal

¹ For standards at least as stringent as CWA § 304(a) aquatic life criteria, the date for initiation of consultation will be the date that the national standards consultation was initiated.

standards to supercede the State/Tribal standards or, in appropriate circumstances, changing EPA's approval to a disapproval. In the unlikely event that the [insert FWS and/or NMFS] determines that disapproval of the State's standard is necessary to avoid likely jeopardy to listed species or the adverse modification or destruction of designated critical habitat, EPA retains the authority to revise its decision from an approval to a disapproval. After such a disapproval, [the State or authorized Tribes'] standard is no longer the applicable CWA standard. The applicable CWA standard reverts to the previously approved standard. In addition, once disapproved, EPA must promptly promulgate superceding federal standards if the [insert State or Tribe] fails to revise its standards within 90 days. See CWA § 303(c)(4) and 40 CFR 131.21.

EPA believes that it is unlikely that the Service(s) will conclude that the [insert State or Tribe's] standards violate section 7(a)(2), since the standards are designed to "protect the public health or welfare, enhance the quality of water and serve the purposes" of the Clean Water Act, which are to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA §§ 303(c)(2)(A) and 101(a).

[Alternative A if the new/revised standards are more stringent than the prior standards]:

Moreover, the new and revised standards being approved by EPA enhance the protection of aquatic ecosystems, including listed species dependent on them, because they impose more stringent water quality standards than previously existed for waters in the [insert State or Reservation]. [insert brief description of how they are more stringent and any evaluation conducted by the Region regarding the potential impacts of concern prior to conclusion of consultation]. EPA believes it is better from an environmental standpoint generally, and with regard to the protection of listed species/critical habitat in particular, to have the new, more stringent water quality standards in place pending the completion of consultation rather than retaining the older, less stringent standards. [NOTE: The analysis in "1" and "2" of Alternative B may also be included here should a question arise whether even the more stringent standard will result in impacts of concern before completion of consultation.]

[Alternative B, if alternative the new/revised standards are less stringent]:

Moreover, EPA believes that the standards being approved by EPA are adequately protective of listed species/critical habitat and will not result in impacts of concern, for the following reasons.

[Insert discussion of:

1. The Region's evaluation of effects of the new/revised standards on the listed species/critical habitat for the interim period until completion of consultation;
2. Whether CWA activities (e.g., NPDES permits or TMDLs) may take place in the affected waters prior to conclusion of consultation, and steps that are being taken to ensure they can be

adjusted if changes are made to the WQS based on the results of the consultation, including whether any site-specific consultation or coordination with the Services will occur on those activities.]

[Alternative C, if there is not a difference in stringency between the new and existing standards]:

Moreover, EPA's approval of the new/revised standards will not cause any impacts of concern to the species/critical habitat during the interim period until consultation is concluded. The new/revised standards do not change the level of protection afforded to waters in the State/Tribe, but instead [insert explanation of the changes associated with the standards, and why EPA concludes there is no change in protectiveness]. Therefore, proceeding with our approval action prior to completion of consultation will maintain the protection that the standards provide for listed species/critical habitat during this interim period. [NOTE: The analysis in "1" and "2" of Alternative B may also be included here should a question arise whether maintaining the status quo will result in impacts of concern before completion of consultation.]